

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
BRIEF**

74-1680

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

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SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellee

PLS

v.

MANAGEMENT DYNAMICS, INC., et al.

Docket No. 74-1680
74-1686

Defendants

WILLIAM N. LEVY, A.J. CARNO INC.,
ANTHONY NADINO, MAYFLOWER SECURITIES
INC., and SAMUEL D. HODGE,

Defendant-Appellants.

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BRIEF OF APPELLANT

MAYFLOWER SECURITIES CO., INC.



BORDEN & BALL
345 PARK AVENUE
NEW YORK, N.Y. 10022

STATEMENT OF FACTS

Mayflower Securities Co., Inc. ("Mayflower") is a New York Corporation located at One State Street Plaza, New York City, which is a broker-dealer in securities and has been registered with the Securities and Exchange Commission ("SEC") since June 25, 1963.

The SEC complaint in the United States District Court alleged two violations and requested that a preliminary injunction be issued against Mayflower and the other defendants. By Opinion dated March 29, 1974, the District Court by the Honorable Robert L. Carter, made certain findings of fact and issued the preliminary injunction against all those defendants who had not previously been eliminated from the proceedings. The first allegation was a violation of Section 5(a) and 5(c) of the Securities Act by the offer, sale and delivery after sale of unregistered stock of Management Dynamics, Inc. ("MD"); the second alleged violation of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10(b)-5 by fraud in the sale of such stock. The evidence adduced at the evidentiary hearing shows that the common stock of MD was quoted in the "pink sheets" of the National Quotation Bureau, Inc., for a period of at least one year prior to the initial insertion of quotes into the "pink sheets" by Mayflower.

The involvement of Mayflower in the trading of MD extended over quite a short period of time between September 27th and December 1, 1972. During this period Mayflower purchased 9,078 shares and sold 8,847 shares of MD as principal for its own account. All purchases and sales were from or to other broker-dealers, no transactions were with any members of the investing public. Finally, there were never any allegations that Mayflower had any connection, other than as a market maker, with MD or its principals.

ARGUMENT

There is great similarity with respect to the facts involving Mayflower and those relating to A.J. Carno, Inc. ("Carno"). This being so, we respectfully agree with, and adopt the argument propounded by counsel for Carno with respect to Points I through VI in its brief. In addition, the following two points are made in further amplification of the precepts enumerated in the Carno brief.

POINT I

THE DISTRICT COURT ERRED IN FINDING THAT THE PRICES AT WHICH MAYFLOWER QUOTED THE SHARES OF MANAGEMENT DYNAMICS SHOULD BE RELATED TO THE BUSINESS OF THAT COMPANY.

The District Court's opinion relating to the trading

by Mayflower criticizes the methodology by which Mayflower as a market maker determined its quotations for the stock of MD. Judge Carter stated that Cirello (the Mayflower trader) "had no knowledge of MD Management capabilities, profits, losses or assets" [but] "The bid and offer quotations were based solely on supply and demand for MD shares" (Opinion pg. 7). It is well known within the business and financial community that the great advantage of the American type of stock market is that it is an "auction" market. In an auction market, the price of a security is determined solely by the law of supply and demand. If a great number of people feel that a company is a good one and wish to buy the shares of it, they will go into the market place to a point where buyers are not willing to pay any higher. On the other hand, if there aren't many buyers at certain prices, but mostly sellers, this phenomenon will cause a decline in the price of the stock as sellers will lower the price that they are willing to accept for the shares. The District Court apparently envisions the market place as a place where prices are determined by how market makers evaluate a company. If this is so it would change the entire concept of how our stock markets operate.

POINT II

THE DISTRICT COURT ERRED IN FINDING
VIOLATIONS OF SEC RULE 15(c)2-11
UNDER THE SECURITIES EXCHANGE ACT
OF 1934.

Rule 15(c)2-11 requires that marker makers have in their files certain enumerated information prior to inserting quotes in an inter-dealer quotation system. While there was never a showing that Mayflower did not have the requisite information, the rule states at paragraph (f) as follows:

(3) the publication or submission of a quotation respecting a security which has been the subject of both bid and ask quotations in an inter-dealer quotation system at specified prices on each of at least twelve days within the previous thirty calendar days, with no more than four business days in succession without such a two-way quotation.

According to the Findings of the District Court there were quotes in the "pink sheets" for a period of at least one year prior to the time Mayflower submitted its quotes. Therefore, by the express language of the statute Mayflower was not required to comply in any way with the provisions of Rule 15(c)-11, even though the evidence did not show that it did not have such information.

CONCLUSION

The evidence does not support the SEC's contention that it is entitled to a preliminary injunction against

Mayflower. The record demonstrates that the SEC failed to show that it had evidence to sustain the claimed violations of Section 5 and 17 of the Securities Act and Section 10(b) of the Securities Exchange Act. Therefore, it is clear that the preliminary injunction against Mayflower was improvidently granted, and it should be vacated.

Respectfully submitted,

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Joel S. Hanover
of Counsel

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AFFIDAVIT OF
SERVICE

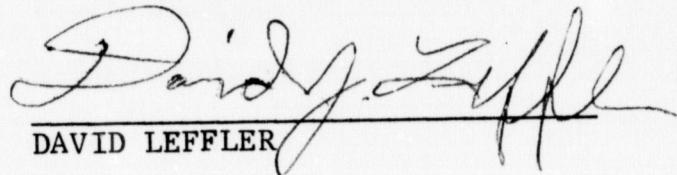
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STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

DAVID LEFFLER, being duly sworn, deposes and says:

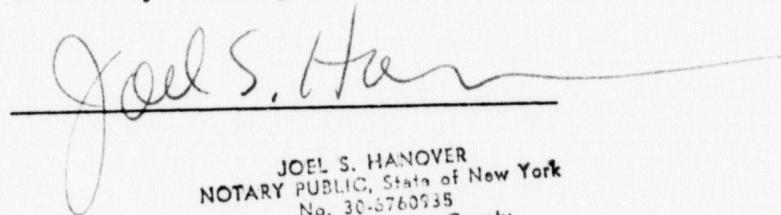
Deponent is not a party to the action, is over 18 years
of age and resides at 385 East 198 Street, Bronx, New York.

On August 12, 1974, Deponent served the Brief of Appellant,
Mayflower Securities Co., Inc. upon the office of the general
counsel of the Securities and Exchange Commission, attorneys
for Appellee in this action, at 500 North Capitol Street,
Washington, D.C. 20549, the address designated by said attorney

for that purpose, by depositing a true copy of same enclosed
in a post-paid properly addressed wrapper in an official de-
pository under the exclusive care and custody of the United
States Postal Service within the State of New York.


DAVID LEFFLER

Sworn to before me this
12th day of August, 1974.


JOEL S. HANOVER

JOEL S. HANOVER
NOTARY PUBLIC, State of New York
No. 30-5760935
Qualified in Nassau County
Cert. filed in New York County
Commission Expires March 30, 1976

STATE OF NEW YORK, COUNTY OF

ss.:

The undersigned, an attorney admitted to practice in the courts of New York State,

Check Applicable Box

Certification
By Attorney

Attorney's
Affirmation

certifies that the within
has been compared by the undersigned with the original and found to be a true and complete copy.
shows: deponent is
the attorney(s) of record for
in the within action; deponent has read the foregoing
and knows the contents thereof; the same is
true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief,
and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF

ss.:

Check Applicable Box

Individual
Verification

the
foregoing
deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

Corporate
Verification

the
a
foregoing
is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because

being duly sworn, deposes and says: deponent is
in the within action; deponent has read the
and knows the contents thereof; the same is true to
deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.
in the within action; deponent has read the
and knows the contents thereof; and the same is true to
deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because
is a corporation and deponent is an officer thereof

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on

19

The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF

is over 18 years of age and resides at

**Affidavit
of Service
By Mail**

On
upon
attorney(s) for

19 deponent served the within

in this action, at

the address designated by said attorney(s) for that purpose

by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

**Affidavit
of Personal
Service**

On 19 at
deponent served the within

upon

the

herein, by delivering a true copy thereof to h personally. Deponent knew the
person so served to be the person mentioned and described in said papers as the
therein.

Sworn to before me on

19

The name signed must be printed beneath